Office Supreme Court U. S.
FILED
OCT 30 1900
JAMES H. MCKENNEY,
Clerk.

Cottell for Appellees

Filed Oct. 30, 1900.

me Court of the United States,

OCTOBER TERM, 1900.

No. 31.

rom the United States Circuit Court of Appeals
for the Fifth Circuit.

E UNITED STATES OF AMERICA,
Appellant,
versus
EUGENE REESE, *et al. Appellees.*

nd Arguments of Alexander Troy and
y S. Cottell, Attorneys for all the Appellees,
of the Henshaw heirs.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 71.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

THE UNITED STATES OF AMERICA,
Appellant,

versus

EUGENE BEEBE, *et al., Appellees.*

Brief and Argument of Alexander Troy and Henry S. Cattell, Attorneys for all the Appellees, except the Henshaw heirs.

STATEMENT.

The original bill in this case was filed in the Circuit Court of the United States for the Middle District of Alabama, on the 10th day of March, 1890 (Record, pp.

1-14), against the appellees named above, except W. R. Waller, administrator of Eugene Beebe, and others. Its material allegations were substantially as follows:

That in June, 1873, Eugene Beebe and Ferrie Henshaw became sureties on the official bond of one Widmer, collector of internal revenue of the Second District of Alabama, in the sum of $50,000, conditioned for the faithful performance of his duties (Record, p. 2). That Widmer failed to account for and pay over a large sum of money, to wit: $28,158.56, which had come into his hands as such collector; that that sum was due and unpaid to the United States at the time of the filing of the bill, with interest from January 1, 1874 (Record, pp. 2-3).

That Beebe and Henshaw had for many years been partners in business, and were joint owners in fee of a number of parcels of real estate situate in and near the city of Montgomery, which were fully described in the bill (Record, p. 3).

That Henshaw died April 19, 1879, leaving certain heirs at law who were named (Record, p. 4). That on June 13th, letters of administration on his estate issued to one Hatchett, and that on the 17th of April, 1880, Hatchett reported to the Probate Court issuing the letters that the estate was insolvent. That accompanying his report was a full statement of all of Henshaw's real and personal property which had come to his knowledge, and all the claims against his estate, which claims, including the debt claimed by the United States, aggregated $54,932.50. That he prayed that the estate be declared insolvent, and that on the 2nd day of July, 1880,

the Court rendered a decree declaring the same insolvent (Record, pp. 4-5).

That Hatchett was removed as administrator, and one Bellinger became such in his place on the 9th day of December, 1882. That Bellinger resigned on the 28th of November, 1883, and no other administrator had ever been appointed on his estate.

That the estate remained unsettled and undetermined, and the personal assets were insufficient to pay the debts (Record, p. 5); that on the 2nd day of July, 1880, Beebe was and had ever been insolvent, without sufficient property to pay his debts, including the debt to the United States (Record, p. 5). That Henshaw was insolvent and without sufficient property to pay his debts (Record, p. 5).

It is then averred that, by reason of the insolvency of Beebe and Henshaw and of the estate of Henshaw, the United States became entitled to priority of payment over any and all other creditors and of their property to the full amount withheld, appropriated and due by Widmer (Record, p. 5).

That on the 3rd day of June, 1880, separate suits were instituted in the Circuit Court of the United States for the Middle District of Alabama by the United States against Beebe and against the administrator of Henshaw, for the recovery of the money due by Widmer; that such suits were continued from time to time at the request and instance of the defendants, until February 6, 1885, when judgments were entered in the court against Beebe, and

against Hatchett as administrator, each for $100 and costs; that on the 1st day of July, 1886, Beebe paid into the Treasury of the United States the sum of $109.85, the amount of judgment and costs rendered against him, but the judgment against Hatchett as administrator remained wholly unsatisfied and was due and unpaid to the United States (Record, p. 5).

The bill then avers that judgments were entered under the following circumstances: "Said defendants came into open court and stated and represented, and caused to be stated and represented for them, that said Beebe and said Henshaw were poor men; that said Beebe and the estate of Henshaw were without property out of which the judgments could be paid and collected; that no part of said judgments could be collected by due process of law; that nothing could be made out of them or either of them or their estates by execution, but that if the Court would allow a jury and verdict to be entered against them for $100, they and each of them would pay said judgments and costs;" that no evidence or proof was or had been introduced in the causes, and the statements and representations aforesaid only were before the Court at the time the judgments were taken, and no hearing or determination upon the law or the facts involved in the causes was ever had.

That upon these statements being made, the Court remarked that unless the District Attorney of the United States objected, the causes might be disposed of as suggested; that the District Attorney did not object, and the judgments were entered for $100 and costs as stated in each of the cases.

That said statements and representations were wholly untrue, and were made to deceive the Court and the United States District Attorney, and for the purpose and with the intent to defraud the United States; that the Court and the United States District Attorney had no authority in law to accept said statements and representations, which were not made under oath nor in the course of judicial proceedings, and were not supported or verified by evidence or proof; that the acts of the U. S. District Attorney amounted in law and in fact to and were, and were intended to be, a mere naked compromise of the claim and demand of the United States against the parties which neither the District Attorney nor the Court had any authority to make, but which they were inhibited by law to make, entertain and consummate; that the Court was without jurisdiction and power to determine the causes in such a manner, and the judgments for $100 and costs were null and void *ab initio* and should be vacated and held for naught in a court of equity (Record, pp. 5-6).

That the Montgomery Light Company, Montgomery Land and Improvement Company, Freedman Vinegar and Cider Works, the Southern Cotton Oil Company, Cleveland Cider Company and Abbie F. Rice assert some claim against certain portions of the property, the nature and extent of which is unknown to complainants; but that such claims are all subordinate to the rights of the complainants to condemn and subject said property to the satisfaction of the debt due by Beebe and Henshaw as bondsmen of Widmer (Record, p. 6).

That if either of the persons or corporations named in the bill claim under or by virtue of any conveyance

from Beebe or Henshaw, or the heirs of Henshaw, the conveyances were each and all without warrant and authority in law, and were and are null and void, and should be vacated, set aside, and held for naught (Record, p. 7).

That on the 22nd of March, 1877, Beebe conveyed all his interest and estate in the property described in the bill to Henshaw, together with certain other property described therein, the same constituting all the real and personal property then owned and possessed by him, Beebe, for the alleged purpose of securing certain pretended liabilities of Beebe to said Henshaw, and to protect and secure real or pretended creditors of the firm composed of said Beebe and said Henshaw, and to enable the said Henshaw more easily and readily to settle and pay the debts of said firm, and to secure him for all moneys Beebe might owe the firm or him on a settlement (Record, p. 7); that the deed contained a provision that if any of the property was not required to be sold for the purposes for which it was conveyed, then on final settlement Henshaw should reconvey the same to Beebe (Record, p. 7). That this deed from Beebe to Henshaw was without consideration and fraudulently made to hinder, delay and defraud the creditors of Beebe, and was void, and that all the property described in the bill remained in the hands of Henshaw, and none of it had been required to be sold for the purposes for which it was conveyed, and that a final settlement had been had of all matters of account and difference between them (Record, p. 7), whereby Henshaw became, and his administrator was and is, bound, and should be required, to reconvey the property to Beebe free of incumbrance (Record, p. 8). That if

the complainants were mistaken in the above allegation, then the property conveyed by Beebe to Henshaw became and was answerable in the hands of Henshaw, his administrator and heirs for the debt due to the United States by Beebe by reason of the default of the said Widmer (Record, p. 8).

The bill prays that said judgments be set aside, vacated and held for naught; that the administration of the Henshaw estate be removed into and settled by the United States court; that an account be stated to ascertain what is due on the bond of Widmer, and that the amount found to be due be held to be a first and prior lien on the property described in the bill; that all conveyances and assignments of the property in conflict with the right and title of the United States be set aside and held for naught, and the property sold for the payment of the debt free from all incumbrances (Record, pp. 8-9).

Each of the defendants filed separate demurrers to the bill. They were substantially the same. Those of Beebe, the Montgomery Land and Improvement Company, Montgomery Light Company, Southern Cotton Oil Company, and Abbie F. Rice, are to be found in Record, pp. 33-37.

The demurrers were sustained—November 6, 1890—and leave granted to amend the bill of complaint (Record, pp. 39-40).

Thereupon on the 5th day of January, 1891, complainant amended the bill (Record, pp. 28-30).

The amendment averred the execution of another

official bond in which Beebe alone, and not Henshaw, was surety upon the bond of one Dustan, Deputy Postmaster at Demopolis, Alabama, in the sum of twelve thousand dollars. A default upon the part of Dustan and the recovery of a judgment for $579.45 in 1878 against his surety, Beebe, in the same court, which judgment was still due and unpaid, an execution thereon having issued and been duly returned "no property."

That the records show that the judgments against Beebe and Hatchett, the administrator of Henshaw, on the Widmer bond, mentioned in the original bill, were regularly had upon a jury and verdict, whereas, in truth and in fact, no jury was then in attendance in said court, and no such verdict was rendered; that the jurors in attendance upon said court had been finally discharged two days prior to the day upon which said judgments were entered, to wit: On February 4, 1885, and that the facts averred were discovered after the filing of the original bill, upon an examination of the records of said court, and some persons who served as jurors at that court, and from the original papers in the cause, which papers do not show the verdict of a jury.

The eleventh paragraph is amended by adding to it an averment that "said Henshaw as such assignee and the heirs of said Henshaw, have paid indebtedness due by said Beebe before having satisfied and paid the debt aforesaid due to the United States, to wit: amongst others a debt due by said Beebe to Mrs. Sarah S. Watson and J. C. Watson, amounting to about fifteen thousand dollars" (Record, pp. 28, 29, 30).

There was no prayer in the amendment.

To the bill as amended the defendants all again demurred, assigning the grounds of demurrer to the original bill, and the following additional grounds: (Record, pp. 40-41 and 54.)

1. That the bill made a new case.

2. That the matters stated in the amendment were not germane to the purpose and object of the original bill, and was new matter.

3. That the bill as amended was multifarious.

Beebe died, and a bill of revivor was filed against his heirs at law and the administrator and they were made parties.

On the 29th day of May, 1897 (Record, pp. 47-50), the case was submitted to the Court on the demurrers to the amended bill. The demurrers were sustained, and the bill was dismissed out of court (Record, pp. 56-57).

There was an appeal by the United States to the United States Circuit Court of Appeals for the Fifth Circuit, which Court affirmed the decision of the Circuit Court of the United States for the Middle District of Alabama, and the United States prosecuted this appeal from the last mentioned decision.

Opinion of the United States Circuit Court of Appeals for the Fifth Circuit Affirming the Judgment of the Circuit Court of the United States for the Middle District of Alabama, which Sustained the Demurrers and Dismissed Appellant's Bill.

Before McCormick, circuit judge, and Swayne & Parlange, district judges.

SWAYNE, district judge, delivered the opinion of the Court.

"It is evident that this is a suit to vacate, annul and set aside the judgment of a Court regularly entered in a matter of which it had jurisdiction, with all the parties before it, on the ground that the said defendants, Beebe and Henshaw, stated to the Court that "they were poor men and were without property; that nothing could be made out of them by execution, and that these statements were wholly untrue and were made to deceive the Court and the United States attorney and with the intent to defraud the United States."

In *United States* vs. *Throckmorton*, 98 U. S., page 61, Mr. Justice Miller announced the established doctrine on this subject to be "that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree between the same parties, rendered by a Court of competent jurisdiction, have relation to frauds, extrinsic or collateral to the matter tried by the first Court, and not to a fraud in the matter on which the decree was rendered."

It is difficult to see upon what theory the judgment in this case can be set aside. The alleged false statements

in the suits brought by the United States on the bond in question were not such as to deceive a person of ordinary care. They could not have deceived the District Attorney who represented the government either as to the amount due on the bond or as to the property owned by the defendants. They did not in any way prevent the government from showing its cause of action and taking judgment for the full amount due if it saw fit to do so. Then in about fifteen months after the entry of said judgment the government accepted satisfaction of the same by the officers of the Treasury Department accepting the $100, with interest, from Beebe. We think the facts of this case bring it under the well-known rule announced in *U. S.* vs. *Throckmorton, supra,* and the cases following it, and that the judgment below should be affirmed."

ARGUMENT.

The principal contention of appellant is that in the entry of these judgments by the United States Circuit Court at Montgomery, Alabama, the Court exceeded its jurisdiction; that in assenting to said judgments the United States District Attorney exceeded his power; that the judgments so entered were not in fact judgments of the Court, but simply a compromise of the government's claim, and that the assent of the District Attorney having been induced by fraudulent statements upon the part of defendants (appellees) the judgments should be vacated and annulled.

It is conceded that the Court had jurisdiction of the subject matter, and the parties to these suits and that the issues to be tried were the amounts of indebtedness of the defendants, sureties upon the bond of a defaulting public officer and their liability therefor (Appellant's brief, page 10).

The amendment to the bill (Record, p. 29) shows the presence of a jury and the rendition of a verdict and entry of judgments upon said verdict, but appellant further seeks to avoid the judgments and to have them declared null and void, upon the averment that there was in fact no jury present at the time the judgments were entered, no submission of testimony to the jury, no verdict thereon, and that the District Attorney was induced to consent to the entry of the judgments for an amount less than that actually due by the false representations of the de-

fendants to the effect that they were poor men; that they had no property and that nothing could be made out of them or their estates by execution. Appellant contends that these averments, if true, would entitle it to have the judgments vacated. The truth of the averments could only be shown by parol testimony to contradict the record.

The United States is not Entitled to any Other or Greater Measure of Relief than Would be Accorded to an Individual Suitor under Like Circumstances.

1. By the uniform decisions of this Court, it has been settled that when the United States comes into court attempting to assert alleged legal rights, the same rules which govern ordinary suitors apply to it. By virtue of being the sovereign, it is not entitled upon any state of facts to any greater relief or measure of relief than would be awarded by the Courts on the same state of facts to the ordinary private citizen. Therefore, when the United States files its bill seeking to annul and vacate a judgment rendered by a competent Court, it cannot obtain relief, unless the facts which are alleged and proved would in the same proceeding entitle the citizen to the relief prayed.

Mitchell vs. *United States*, 9 Peters, 711.
The Syren, 7 Wall, 159.
Chicago vs. *United States*, 104 U. S., 685.
United States vs. *Beebe*, 17 Fed. R., 36.

The case of *United States* vs. *Beebe*, 17 Fed. R., 36, contains a full collection of the authorities sustaining this position. The opinion in that case was delivered by a judge who, by his learning and ability, has deservedly won for himself a high position in the American judiciary.

The only exception to the rule as stated above is that the statute of limitations does not interfere with the granting of relief to the United States where the citizen might be barred, but the United States, like an individual, will be bound by the presumptions which arise from long years of acquiescence in the acts of its agent. From this long acquiescence and from the failure to refund or offer to refund money received by it through the act of its agent, the authority of the agent in the first instance will be presumed or, at least, a subsequent ratification.

The United States, when it comes into a court of equity, and asks that relief be granted it, must show, like an ordinary suitor, upon the face of the bill that it has a clear and unquestionable right to the relief which is sought.

United States vs. *DesMoines*, 142 U. S., 540.
United States vs. *Beebe*, 17 Fed. Rep., 36.

Payment and Satisfaction of the Judgment against Beebe was in Law Payment and Satisfaction of the Judgment against the Administrator of Henshaw.

2. The facts shown by the pleadings are, that Eugene Beebe and Ferrie Henshaw were sureties on the bond of one Widmer; that the condition of the bond was, that Widmer would account for and pay over all money

which came into his hands as collector of internal revenue; that Widmer failed to pay over $28,158.56 thus collected for which his sureties were bound; that separate suits to recover the money were instituted by the United States against Beebe, and the administrator of Henshaw, deceased; that in 1885 there was a trial of each of said causes and a judgment for the plaintiff in each for one hundred dollars, besides costs; that Beebe, in July, 1886, paid into the treasury of the United States the full amount of the judgment against him; that said payment by Beebe was accepted by the United States as a satisfaction of said judgment and for no other purpose; that the appellant still holds said money, and did not offer before filing said bill and did not offer in its bill to either pay back said money to Beebe or to credit it on its claim against him. Beebe and Henshaw, having been joint sureties upon this bond, the obligation resting upon Beebe and upon Henshaw was the same, and, although no suit was brought against them jointly, but they were sued separately, the satisfaction of the judgment against Beebe was in law the satisfaction of the judgment against the administrator of Henshaw.

2 Freeman on Judgments, Sec. 467.
Cox vs. *Smith*, 10 Ore., 418.
Bank vs. *Manley*, 1 Strob., 414.
Sherwood vs. *Collier*, 24 Am. Dec., 264.
Matthews vs. *Lawrence*, 43 Am. Dec., 665.

The Judgments were Final Judgments. Regularly Entered in a Court Having Jurisdiction of the Cause and of the Parties, and the Record Cannot be Contradicted or Impeached nor the Judgments be Vacated Save for Fraud Extrinsic or Collateral to the Matter Tried.

The judgments in the cases brought and tried against Beebe and the administrator of Henshaw were judicial ascertainments that Beebe and Henshaw were liable to the government of the United States on account of the default of Widmer in the sum of one hundred dollars, besides costs, and no more. Into these judgments, the entire cause of action which the United States had against Beebe and Henshaw for the default of Widmer was merged, and this default should never again become the basis of a suit between the parties. No further action could be prosecuted between the parties to that suit in reference to the matters therein involved.

1. Freeman on Judgments, Sec. 215, and authorities cited.

The judgments rendered are conclusive that the amount recovered, and no more, was due, until they are set aside by some proper proceeding.

1 Freeman on Judgments, Sec. 249.
Fendall vs. *United States,* 14 Ct. of Claims Reps., 247.

The record of the judgment imports absolute verity, and its recitals cannot be contradicted or varied unless some recognized reason for vacating and annulling said judgments is averred or shown. Evidence *aliunde* cannot be introduced to contradict the recital that there was

a jury and verdict for the amount named unless there is an averment of facts showing such a fraud in the procurement of said judgments as would authorize a court of equity to set them aside.

Beverly vs. *Stevens*, 17 Ala., 701.
Deslonde vs. *Darrington*, 29 Ala., 92.
Note Duchess of Kingston's Case, 2 Smith, L. C., side pages 437-8.

The rule above noted as to contradicting the recitals of the record of judgments applies with as much force to consent judgments and decrees as to any others.

"The maxim that fraud vitiates every proceeding, must be taken like other general maxims to apply to cases where proof of fraud is admissible." But where the same matter has been actually tried, or so in issue that it might have been tried, it is not again admissible. The party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be contradicted (*Green* vs. *Green*, 2 Gray, 361). Or, in other words, the recitals of the record of a judgment import absolute verity, until the facts are averred which show the judgment was procured by fraud; that is, that there was a fraud perpetrated by the party against whom complaint is made which would authorize a court of equity to vacate and annul the judgment.

Thompson vs. *Maxwell*, 95 U. S., 391.
U. S. vs. *Throckmorton*, 98 U. S., 61.
McDonald vs. *Pearson*, 114 Ala., 630.

"But the term 'fraud' is indefinite, and when it is said that a judgment is vitiated, and may be nullified by

fraud, it is not to be understood that the fraud which consists in false testimony, or the suppression of the truth, in respect to matters litigated upon the trial of the action which results in the judgment, is sufficient to have this effect."

Hilton vs. *Guyot*, 42 Fed. Rep. on p. 252.
Kimberly vs. *Arms*, 40 Fed. Rep. on p. 558.

"The frauds for which courts of equity will intervene to set aside and stay the enforcement of the judgment of the Court having jurisdiction of the subject matter and the parties, must consist of extrinsic, collateral acts, not involved in the consideration of the merits. They must be acts by which the successful party has prevented his adversary from presenting the merits of the case, or by which the jurisdiction of the Court has been imposed upon."

United States vs. *Flint*, 4 Sawyer, 42.

Mr. Justice Miller, in delivering the opinion of this Court in the case of the *United States* vs. *Throckmorton*, 98 U. S., 61, carefully considered the authorities as far back as the decision delivered in the year 1702 by the Lord Keeper in the High Court of Chancery, in the case of *Tovey* vs. *Young*, Pr. Ch., 193. He quotes the language of Ch. J. Shaw in *Green vs. Green*, 2 Gray (Mass.), 361, *supra*, and then uses the following language:

"We think these decisions establish the doctrine on which we decide the present case, namely, that the acts for which a court of equity will on account of fraud set

aside or annul a judgment or decree, between the same parties, rendered by a Court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first Court, and not to a fraud in the matter on which the decree was rendered.

"That the mischief of re-trying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases."

Mr. Justice Miller then points out that relief against a judgment will be granted in equity cases only "where by reason of something done by the successful party to a suit there was in fact no adversary trial or decision of the issue in the case. Where the successful party has been prevented from exhibiting fully his case by means of deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise, or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney employed corruptly sells out his client's interest to the other side—these and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside or annul the former judgment or decree, and open the case for a new and a fair hearing."

Since that decision, *United States* vs. *Throckmorton*

has been cited with approval by this Court in the following cases:

Marquez vs. *Frisbie*, 101 U. S., 479.
Vance vs. *Burbank*, 101 U. S., 520.
Steel vs. *Smelting Company*, 106 U. S., 454.
Western Pac. R. R. Co. vs. *U. S.*, 108 U. S., 513.
Pac. Ry. Co. of Mo. vs. *Mo. Pac. Ry. Co.*, 111 U. S., 520.
Mahn vs. *Harwood*, 112 U. S., 365 and 368.
Moffatt vs. *U. S.*, 112 U. S., 32.
U. S. vs. *Minor*, 114 U. S., page 241.
Maxwell Land-Grant Case, 121 U. S., 379.
U. S. vs. *San Jacinto Tin Co.*, 125 U. S., 281 and 304.
Cragin vs. *Powell*, 128 U. S., page 699.
Marshall vs. *Holmes*, 141 U. S., 596.
U. S. vs. *DesMoines Co.*, 142 U. S., 540.
Hilton vs. *Guyot*, 159 U. S., 207.

In *Marquez* vs. *Frisbie, supra*, it is cited as authority for the statement that "it is idle at this day to suppose that the expensive machinery of a court of equity is to be put in operation for the purpose of reviewing and reversing the judgment of the tribunals to whom that question is by law entrusted on such loose, untraversable allegations of fraud in general."

In *Vance* vs. *Burbank, supra*, the doctrine of *United States* vs. *Throckmorton* is spoken of as "settled."

In *Moffat* vs. *U. S., supra*, the case of *U. S.* vs. *Throckmorton*, and *Vance* vs. *Burbank, supra*, are distinguished from that case.

There is no conflict between the case of *United*

States vs. *Throckmorton*, 98 U. S., 61, and the cases of *Johnson* vs. *Waters*, 111 U. S., 640, *Arrowsmith* vs. *Gleason*, 129 U. S., 86, or *Marshall* vs. *Holmes*, 141 U. S., 596. The case of *Johnson* vs. *Waters, supra*, was based upon "fraud in obtaining the judgment," the case of *Arrowsmith* vs. *Gleason, supra*, upon an imposition practiced upon the Court, and the case of *Marshall* vs. *Holmes, supra*, is based upon the fact "that the facts constituting the fraud were not, before the rendition of the decree, within the knowledge of the party seeking its annulment, or could not have been discovered in time to bring them in some appropriate mode to the attention of the Court while the decree was within its control," and in the case last cited it is said that equity would not interfere with a judgment rendered by a court of law if the party by the exercise of diligence could have ascertained the facts and presented them to the Court, and it is also held in that case that the failure to present the rights of the complaining party fully to the Court must appear to have been caused by fraud or accident unmixed with fault or negligence on the part of the complaining party.

As to the Alleged Fraud.

Applying, therefore, the doctrine and the rules set forth in the case of *United States* vs. *Throckmorton, supra*, and those which follow that decision, it is difficult to understand upon what theory it can be claimed that the judgments in the case under consideration should be set aside.

The so-called fraud of the defendants in the suits brought by the United States for the recovery upon the

bond in question, which, it is claimed, would justify a court in equity in setting aside the judgments, are that they represented or caused to be stated to the Court that "said Beebe and said Ferrie Henshaw were poor men and that said Beebe and the estate of said Ferrie Henshaw were without property out of which the said judgments could be paid and collected; that no part of said judgment could be collected by due process of law; that nothing could be made out of them, or either of them, or their estates by execution, but that if the Court would allow the jury and verdict to be entered against them for one hundred dollars, they, and each of them would pay said judgments and costs." And that said statements and representations were wholly untrue and were made to deceive said Court and the United States District Attorney (Record, pages 5 and 6); but it is not alleged that before the rendition of the judgments, the complainant did not know of the falsity of said statements, or could not by due diligence have discovered their falsity in time to bring the matter to the attention of the Court before the rendition of said judgments. "This requirement of diligence is, as it ought to be, enforced with strictness."

Marshall vs. *Holmes,* 141 U. S., 596.

As against the proposition that the complainant now has any right to ask a court of equity to set aside said judgments, it may be urged:

(*a*) *The bill distinctly avers that Beebe and Henshaw were insolvent and had no property* (Record, p. 5). Therefore, the government could not have been surprised and deceived by the statements made by Beebe and Hen-

shaw to the same effect, and the falsity of said statements, if known or susceptible of ascertainment by diligence at the time, cannot be made a ground for equitable relief against said judgments. It is a maxim of the law that "Where the means of knowledge are open to one, he is chargeable with knowledge from the date when he should have discovered the facts."

Foster vs. *Mansfield,* etc., 36 Fed. R. on p. 638.

The statement that Beebe and Henshaw were poor men and that nothing could be made out of them would seem not to be untrue, for the bill alleged that the administrator of Henshaw had reported to the state court declaring his estate insolvent, and, five years before the acts charged in the bill, viz.: in 1880, the United States Marshal had made a return of "no property" on an execution against Beebe. It is nowhere alleged or suggested in the bill that Beebe and Henshaw, at the time said alleged false statements were made, and at the date of said judgments, did have any property free from superior liens or which could have been reached by execution. The allegations of fraud are general, not specific. The statements alleged to have been made in behalf of Beebe and Henshaw with respect to their insolvency will not sustain the allegation of fraud, unless it is specifically averred and shown in *what* said statements were untrue, and further that said statements were not known, and could not by diligence have been ascertained to be untrue before the rendition of the judgments. The statements were not calculated to mislead or deceive for the reason that the truth or falsity thereof could have as easily been ascertained then as afterwards from an inspection of the public records.

(*b*) *It is not averred that the Court or the district attorney was in fact deceived.*

Non constat, the district attorney knew all the facts in relation to the property of Beebe and Henshaw, and their ability to pay, but deemed it for the best interests of the government to accept the verdict and judgment entered. It is not shown that there was any fraud in obtaining the judgment, or any fraud by which the Court was imposed upon or misled into a false judgment.

Johnson vs. *Waters,* 111 U. S., 640.
2. Freeman on Judgments, Sec. 489.
McDonald vs. *Pearson,* 114 Ala., 630.

The fraud of Beebe and Henshaw must have been such as to prevent the United States from successfully prosecuting its claim in the original suit in which the judgment was obtained, and this must have been without any fault on the part of the United States or its representatives.

Marine Ins. Co. of Alexandria vs. *Hodgson,* 7 Cranch, 332.
Marshall vs. *Holmes,* 141 U. S., 586.

It is always a condition precedent to a court of equity interfering with the execution of a judgment, that facts be disclosed establishing that the matter now in the form of an adjudication, was in truth, without any fault of the party seeking to avoid its effect, a determination in which he could not present his cause of action or ground of defence to the Court, either because the Court was not competent to hear it and grant relief thereon, or because he was prevented from presenting it or having it

properly considered by the Court, through fraud, accident or surprise.

2. Freeman on Judgments, Section 486.

A court of equity will not lend its aid to set aside a judgment unless the party claiming its assistance can impeach the judgment by facts or grounds of which he could not have availed himself at law or of which he was prevented from availing himself by fraud, accident or act of the opposite party, unmixed with negligence or fault on his part.

Watts vs. *Gayle*, 20 Ala., 817.
Morrison vs. *Udall*, 37 Am. Dec., 604.

Relief will not be granted against a judgment on the ground that it is contrary to equity unless the party was ignorant of the fact in question pending the suit, or unless that fact could not have been received in evidence in the action at law, or unless he was prevented from availing himself of it by fraud, accident or the act of the other party, unmixed with negligence or fraud on his part.

2. Freeman on Judgments, Section 486.
Kinney vs. *Ogden's Administrator*, 3 N. J. Eq., 168.
Hair vs. *Lowe*, 19 Ala., 324.
Hibbard vs. *Eastman*, 93 Am. Dec., 467.
Smith vs. *Worthington*, 53 Fed. Rep. on p. 981.

(c) *The questions involved in the allegations of fraud were all tried, or so in issue that they could have been tried.*

It is difficult to conceive how the statements, even if made by and for Beebe and Henshaw and utterly false

as alleged, could have prevented the government from presenting its cause of action. They could have had no bearing or relation whatever upon the question of the amount that the government was entitled to recover in the suit. They might have had some bearing or relation upon the question whether the government should compromise the judgment *after it was recovered*, but certainly they did not deprive the government of the opportunity of establishing its claim to the full amount that was due to it if it desired to do so. Fifteen months elapsed between the entry of the judgment and the date of its payment by defendants, and during that time it was possible for the government at any time, if deceived by the defendants, to have moved for a new trial.

(*d*) *The result was not unmixed with neglect or fault on the part of the United States.*

Conceding that the alleged false statements were made, they were not such as should have deceived the government. They were simply calculated to put the government and its attorney upon inquiry. For a creditor or his attorney to accept the statement of a debtor as to his solvency or insolvency at time of trial, and by reason thereof to forego without inquiry his right to enter a judgment against him for the full amount which he might be entitled to recover would be the grossest neglect, and negligence against which a Court of Equity will not relieve. The act of the attorney in such a case as we have seen above is the act of the principal.

Ezzell vs. *Watson*, 83 Ala. on p. 123.

(*e*) *Fifteen months after verdict and judgment plaintiffs accepted the amount thereof and thereby released and forever satisfied the judgment.*

Much stress is laid upon the fact that the District Attorney had no authority to consent to the rendition of the judgment. But as we have seen above, the United States is like all other parties to suits. They are bound by the same rules that any other parties are bound by. The District Attorney was undoubtedly authorized to represent it, and the law is well settled that the action in a pending suit of an attorney authorized to represent a party is binding on that party at law and in equity unless such action was induced by the fraud of the adverse party, and that fraud must have been one which prevented the assertion of the claim or defence. The allegations of fraud in this case fall far short of what is required in this respect, and it is confidently asserted that no cases can be cited where in the absence of such fraud a judgment has been opened or set aside after the full amount of it had been collected and received by the principal upon the mere allegation that the attorney had no authority to consent to the rendition of the judgment.

(*f*) *There is no equity in the bill; there has never been an offer to return the amount collected under the judgment.*

In 1886, about fifteen months after the rendition of the judgment, the government of the United States accepted satisfaction of the same. We must presume, because it is not denied in the bill, that the officer of the Treasury Department who accepted this one hundred dollars with interest thereon, from Beebe in satisfaction of the judgment against him, was authorized to accept it. There has been no offer to return the amount of the judgment, and without such offer the bill could not be sustained.

Suppose A, as attorney for B, has a suit pending against C. C makes a statement to A that he (C) is a poor man and has no property subject to execution, but if A will take a judgment for a small per cent. of his claim, he (C) will pay the judgment. The public records show C has property liable to execution, but A does not examine them. A accepts C's proposition; takes judgment for the small amount proposed by C, and C pays the judgment as agreed. Would any one suppose for a moment that the judgment could be set aside in equity by merely showing that C's statement to A as to his financial condition was false, and that A did not know it at the time because he failed to examine the public records?

Courts of equity will not grant relief on the ground that an attorney, through design or ignorance mismanaged the case or that the client being absent, the attorney, through a misapprehension of the facts, consented to a judgment.

2 Freeman on Judgments, Section 508.
Burton vs. *Wiley*, 26 Vt., 430.
White vs. *Bank of U. S.*, 6 Ohio, 528.
Thompson vs. *May*, 13 Ark., 600.
Burton vs. *Hynson*, 14 Ark., 32.
Broda vs. *Greenwald*, 66 Ala., 538.
Ezzell vs. *Watson*, 83 Ala. on p. 123.

Much stress is laid in this case upon the fact that, although the record declares that there was a jury and verdict ascertaining the amount, yet in truth and in fact there was no jury and verdict, and that the District Attorney consented to the rendition of the judgment. The trouble with the appellants is, that before they can ever introduce evidence to establish that fact, as was said by

Ch. J. Shaw in the case of *Green* vs. *Green*, there must first be made out a case where proof of the fact is admissible, and unless the alleged fraud is one which justifies a court of equity in admitting such proof, the judgment must stand as a judgment rendered by the Court upon the verdict of a jury ascertaining the amount in an adversary suit.

This Court must judicially know that nothing is more common in practice than for judgments to be entered up as upon a jury and verdict when in fact there never was a jury. It is the usual case where parties defendant appear and there is no actual trial, because in such a case there can be no judgment without the verdict of a jury, unless it is a judgment by consent, or a judgment entered on the withdrawal of the pleas. Wherever pleas are interposed in a case, if a judgment is entered up it would be erroneous on its face unless it showed that there was a withdrawal of the pleas and a judgment *nil dicet* thereupon, or that there was a consent judgment, or that there was a jury and verdict, or something equivalent to a jury and verdict, for instance, an ascertainment of the amount by the Court, a jury being waived.

But, as we have seen above, the United States is like all other parties to suits. They are bound by the same rules that any other parties would be bound by. The District Attorney was undoubtedly authorized to represent them, and the law is well settled that the action of an attorney authorized to represent a party is binding on that party at law and in equity, unless it was induced by the fraud of the adverse party, and that fraud must have been one which prevented him from asserting his claim or defence. And the rule that a party cannot in equity find relief from the consequences of his own neg-

ligence is equally applicable whether the neglect is that of himself or that of his attorney employed in the management of his case.

2 Freeman on Judgments, Section 500.
Vaughn vs. *Hewitt*, 17 S. C., 442.
Bradish vs. *Gee*, 1 Amb. 229.
Jones vs. *Williamson*, 5 Cold. 371.

The District Attorney not only had Power to Assent to the Judgment, but in the Case at Bar, his Action was Ratified by his Principal, the Appellant.

A number of authorities are cited by counsel for the appellants, in which judgments rendered by consent of an attorney have been set aside, some by courts of equity, but in most instances on motions for a new trial in the Courts rendering them. In every one of those cases there was a fraud by the opposite party which would have justified the setting aside, of a judgment independent of the fact that the attorney had no authority to compromise the claim. There is another fact which appellants seem to have overlooked; or, at any rate, to which they did not call the attention of the Court. In none of these cases did the party himself consent to or ratify the action of the attorney. There was an usurpation of power by the attorney and fraud by the opposite party. Those two combined operated to make a case for the interposition of a Court of Equity. It took them both to entitle the complainant to relief, because if the complainant had consented to the judgments in the cases he could not have asserted or set up the usurpation of power by the attorney.

In the case at bar it is not pretended but that the Dis-

trict Attorney and other United States officials knew the amount due on the bond of Widmer; that was a thing peculiarly within the knowledge of the officers of the government. In the very nature of things, it could not be known to the sureties on the collector's bond. Therefore, the government was never deceived by any act of the defendants with respect to the amount that was due on the debt. Nor did any act of defendants affect in any way its right to recover judgment for the full amount due. The only fact about which it is claimed the government was deceived was as to the property owned by the defendants and the ability to make a judgment out of them when recovered. In 1886, about fifteen months after the rendition of the judgment, the government of the United States accepted satisfaction of the same. We must presume, because it is not denied in the bill, that the officer of the treasury department who accepted this $100 with interest thereon from Beebe, in satisfaction of the judgment against him, was authorized to accept it. We do not suppose that, in a single one of the cases cited by the appellants on the power of a chancery Court to set aside a judgment rendered by consent of counsel without authority, the Court would ever have granted the relief, if, after the judgment was rendered, the client had ratified the action of counsel by accepting satisfaction of the same. We repeat what is said above, a statement made by a party, though untrue, cannot be a fraud which would justify a court of equity in setting aside a judgment unless there was some natural relation of cause and effect between the statement and judgment. It cannot be possible that a statement by a debtor as to his pecuniary condition would be a ground for setting aside a compromise made with him, especially where the matter about which the

statement was made is a fact to be ascertained from the public records. As to Beebe, the bill avers the statement was true; as to Henshaw, it avers the administrator made a report in a cause to which plaintiffs were parties disclosing all of his property several years before the judgment was rendered.

The Case of Holker vs. Parker, Relied Upon by Appellant, has no Application in the Case at Bar.

The appellant relies very greatly in this case upon the case of *Holker vs. Parker*, 7 Cranch, 436. The principles governing the decision in that case have no application here. In that case a judgment had been recovered in favor of Holker in the state of Pennsylvania. This Judgment was certified to a Court in Massachusetts, an attachment *sur* judgment issued, and his attorney employed for the collection of the judgment, without authority to do so, consented to the rendition of an award by arbitration to him of greatly less than was due. This was pure and simple a compromise of his client's rights not in a pending suit, and with no authority in the premises, except to collect the claim. There was not "an offer to buy or sell peace against a doubtful or disputed claim, the subject of a *pending* suit," but it was in effect an agreement to satisfy a judgment already rendered for a less sum than its full amount. There was no dispute that a judgment had been rendered and no controversy as to its amount. There was an agreement to take less for the judgment than the amount thereof.

In the case at bar the action of the District Attorney was in a pending suit, and the consent to judgment for

a smaller amount than was thought to be due was clearly within the powers of the District Attorney. "The power of an attorney is not co-equal, co-extensive, or the equivalent of the client. He is, as has been said in numerous decisions of this Court, a special agent, limited in duty and authority to the vigilant prosecution or defence of the rights of the client. He can enter into no bargains, or contracts, though he *may make* agreements in writing touching the course of proceeding in *pending* suits, or the issue or return of executions on judgments he may have obtained, which will bind the client, unless he has specially authorized or subsequently ratified them. . . Within the limits of that professional action which may be necessary for the conduct of the proceedings in the course of *pending* suits . . the attorney may have large discretionary powers given to him, that he may perfect and promote the rights and interests of the clients."

Robinson vs. *Murphy*, 69 Ala. on p. 547.

The authority of an attorney to compromise pending litigation is fully recognized in the English courts upon the theory that he is, as to the matters involved in the litigation, the general agent of his client. Many American Courts coincide with the English rule.

Prof. Green's note to Sec. 24, 8th Ed. Story on Agency.

Wharton on Agency, Sec. 587-92.

In *Holliday* vs. *Stuart*, 151 U. S. on p. 237, it was held that an agreement made by an attorney that certain property might be sold and the proceeds paid into the court to await the result of an appeal was binding on the client, and in *Bonnifield* vs. *Thorp*, 71 Fed. Rep., 924, it

is held that a party to a proceeding in court and represented by an attorney has no right to make agreements affecting the conduct of the case.

As in the case of the *United States* vs. *Child*, 79 U. S., 246, the claim was disputed by defendants. They said to the United States through its District Attorney, "We will pay you a certain sum on this disputed claim, provided you will take it in satisfaction of the whole," and when the United States accepted this proposition and received the money paid in carrying it out, that was the end of the matter.

Courts are reluctant to set aside a compromise, and in such cases very slight evidence of acquiescence on the part of the client will be deemed a ratification of the attorney's act in making the compromise.

3 Ency. of Law, 2nd ed., p. 360.

In this case, about a year after the judgment was rendered, the United States received the money, and still has it and does not offer to return it or credit it upon the amount it claims to be due.

As to the Rules and Regulations by Which the District Attorney is Alleged to Have Been Bound.

It is contended by the appellant (pp. 25-27 his brief) that certain regulations of the Solicitor of the Treasury, made in 1877, should have prevented the District Attorney from acting in the manner alleged, and that, therefore, the appellant has the right to set aside the judgments rendered. There are several reasons why these regulations can be of no avail in this case.

In the first place, there is no allegation concerning

them in the pleadings, and even if the Court would take judicial notice of their existence if set out and pleaded, in the absence of any mention of them in the pleadings, they cannot be invoked to aid the equity of the bill.

Again, even if it be admitted that these regulations are considered as a part of the bill, the bill does not allege that said judgments were not taken with the full concurrence and assent of the Solicitor of the Treasury, and, taking the bill most strongly against the pleader, as we are bound by all rules to do, we must presume, in the absence of allegations to the contrary, that the District Attorney acted within the scope of his authority and with the approval of the Solicitor of the Treasury, especially when we consider the other part of the bill, in which it is set forth that the amount due on the judgment against Beebe was accepted by the appellant, presumably after the District Attorney had made report of his actions in due form and at the proper time.

It is not alleged in the bill that this action of the District Attorney was not taken under circumstances which allowed him, according to the terms of the regulations set out on page 27 of appellant's brief, to act without consultation with the Solicitor of the Treasury. The mere allegation that the District Attorney acted without authority and in violation of the law, is but a conclusion of the pleader which will be disregarded as being general and not specific in its nature. It is not controverted that the District Attorney made immediate report of his action, and the acceptance of the amount of the Beebe judgment would tend to show acquiescence in his action by his superiors.

And finally, it is not alleged that Beebe or Henshaw had any notice of the regulations made by the Solicitor of

the Treasury referred to, and they were not bound to know such regulations on the principle that every man is bound to know the law, because these regulations were simply the instructions from a superior to his inferior and not binding on a party who dealt with said inferior within the scope of his apparent authority.

The Amendment did not Cure the Defects of the Original Bill, but did Add a new Cause of Action and made the Bill Multifarious.

The bill as originally framed was a bill to set aside a certain judgment and have an accounting as to what was due by Beebe and Henshaw on the Widmer bond. The bill as amended is not only a bill to set aside that judgment and have an accounting, but it is a bill to enforce the collection of a judgment against Beebe alone on the Dustan bond. The amendment introduces a new cause of action and by it appellant seeks to recover not only against Beebe but gainst the Henshaws upon a claim upon which neither Henshaw nor his estate were ever liable, and as to which Beebe alone was liable. The bill as amended, therefore, would require two measures of relief, the one against Beebe and Henshaw jointly, and the other against Beebe alone. Two such claims cannot be enforced in the same bill. The two being joined makes the bill multifarious.

Story's Eq. Plead., Sec. 271.
Kimberly vs. *Arms*, 40 Fed. Rep., 548.

The appellant fails utterly to meet this objection as to multifariousness, and we cannot adopt the rule invoked

by counsel for it (p. 34 his brief) for the Court had jurisdiction both of the claim against Beebe and Henshaw jointly and of the claim against Beebe alone, if these separate and distinct matters had been presented in separate bills. How is the fact that Beebe alone was liable on the bond of Dustan to help to elucidate the question whether or not the judgments against Beebe and Henshaw as sureties on the bond of Widmer had been brought about by fraud or through lack of authority on the part of the District Attorney? Of what interest can it possibly be to the representative of Henshaw whether Beebe shall or shall not be held liable as the bondsman of Dustan, and why should the representative of Henshaw be required to litigate that question with appellant? If we adopt the suggestion of appellant and consider as stricken out of the bill one of these inconsistent claims, which shall it be? Shall it be the claim against Beebe and Henshaw jointly, or the claim against Beebe alone? Who is to decide this matter? The Court had jurisdiction of both claims, and it seems to us the appellant should have elected as to which claim he would prosecute, and should have eliminated the other from his bill. This he has failed to do. He has chosen to prosecute both of these inconsistent claims together, and he must stand on his bill as he has made it. Clearly, the appellant has no right to prosecute in the same bill two separate and distinct claims, as to one of which some of the parties defendant have no interest, and as to which said parties could under no circumstances be made liable.

Hardin vs. *Swope*, 47 Ala., 273.
Kinsey vs. *Howard*, 47 Ala., 236.
Johnson vs. *Parkinson*, 62 Ala., 456.
Andrews vs. *Jones*, 68 Ala., 117.

It is respectfully urged, therefore, that there is no error in the record, and that the decision of the Court of Appeals should be affirmed.

ALEXANDER TROY,
HENRY S. CATTELL.
Attorney for all the Appellees, except the Henshaw heirs.